



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Women Microfinance Limited v Angore (Appeal E009 of 2023)
[2023] KEELRC 2556 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2556 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E009 OF 2023
M MBARÚ, J
OCTOBER 19, 2023**

BETWEEN

KENYA WOMEN MICROFINANCE LIMITED APPELLANT

AND

DAVID CHARA ANGORE RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrates Court
at Malindi delivered by Hon. E. K. Usui in CMELR No.54 of 2019)*

JUDGMENT

1. The appeal herein following judgement delivered on 5 April 2023 in Malindi CMELRC No.54 of 2023. The background being that, the respondent as the employee of the appellant had filed a claim on the grounds that his employment was terminated unfairly. That on 17 April 2014 he was employed as the branch manager earning a wage of Kshs. 41,500 per month but on 8 December 2017 he was forced to resign after undertaking a faulty transaction. That this was unlawful and unfair and he claimed the following dues;
 - a. Notice pay at Kshs. 41,500;
 - b. Accrued leave days Kshs. 60,000;
 - c. Gratuity Kshs. 322,000;
 - d. General damages for unfair termination of employment;
 - e. Certificate of services, and
 - f. Costs.



2. In response, the appellant's case was that the respondent resigned on his own accord after he was taken through the disciplinary process over fraud. A notice to show cause had been issued and invitation to a hearing on 23 November 2017 and to pre-empt disciplinary hearing, he tendered his resignation. There was payment of the following terminal dues;
 - a. Notice pay;
 - b. Accrued salary up to 8 December 2017,
 - c. Accrued leave days; and
 - d. Gratuity for the period worked.
3. The learned magistrate analysed the evidence and made a finding that there was no evidence with regard to payment of any terminal dues of ksh. 136,979.43 as the appellant had asserted and hence, the remedies sought and allowed were for payment of;
 - a. Notice pay at Ksh. 41,500;
 - b. Accrued leave days ksh. 18,527.92;
 - c. Gratuity Ksh. 322,000;
 - d. Certificate of Service;Total dues Ksh. 382,027.92.
4. Aggrieved by the judgment and decree of the trial court, the appellant has lodged this appeal on seven grounds being that the awards by the trial court at Ksh. 382,027.92 were not justified as the court failed to appreciate the evidence that these had been paid despite the resignation of the respondent and the judgment should be set aside.
5. Parties attended and agreed to address the appeal by way of written submissions.
6. The appellant submitted that the trial court failed to find that the respondent resigned voluntarily and was paid all his terminal dues which was part of the record. The resignation was voluntary and the allegations that this was forced was without evidence to claim under constructive dismissal as defined in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR. in constructive dismissal, the respondent had the duty to demonstrate and establish that he was forced to tender his resignation which was not the case. On 8 December 2017, the respondent resigned from his employment after being issued with a notice to show cause why disciplinary action should not be taken against him over a case of fraud. The disciplinary proceedings were still ongoing when he opted to resign. He cannot turn around and claim in constructive dismissal.
7. Part of the clearance process was for payment of ksh. 136,979.43 in terminal dues including pay for 8 days worked in December 2017 and the appellant filed a pay slip in this regard.
8. The respondent submitted that the respondent was coerced by the appellant to tender his resignation letter due to disciplinary issues, under the guise that it was the only way he would be paid his terminal dues. He was not paid or issued with a certificate of service. This resulted in constructive dismissal as held in *Coca Cola Africa Ltd v Maria Kagai Ligaga* [2013] eKLR that the employer is guilty of breach of the employment contract where they place the employee under intolerable working conditions and the employee is allowed to resign and to claim in constructive dismissal.



9. The respondent testified that he was not given a chance to defend himself but rather, he was forced to tender his resignation. The terminal dues paid were less deductions which were not explained or accounted for. The hostile work environment was not conducive for the respondent. In the case of *Edwin Beiti Kipchumba v national Bank Limited* [2018] eKLR the court held that disputes on resignation are highly fact-driven and the best approach is to examine each case on its own facts. In this case, the appellant took advantage of the respondent's vulnerability and forced him to resign from his employment under the guise of a promise to be paid his terminal dues. The findings by the trial court are proper and the appeal should be dismissed with costs.

Determination

10. This being a first appeal, the court is required to re-evaluate the record and findings made and arrive at own conclusions and taking into account, the trial court had the opportunity to hear the witnesses in evidence.
11. The claim by the respondent before the trial court was that on 8 December 2017 he issued a resignation notice following a directive by the respondent, the employer and further, to hand over the ESOP Certificate to the HR Department after which his terminal dues would be paid on 7 March 2018 upon clearance from the regional office and Uaminifu Sacco. He thus tendered his resignation.
12. The respondent pleaded at paragraph (4) of the Memorandum of Claim that;
- The claimant maintains that on 8th December 2017 he was forced by the respondent to tender in his resignation letter after the claimant undertook a faulty transaction.
13. On their part, the appellant's case before the trial court was that the respondent as the employee resigned on his own volition after he was taken through a disciplinary hearing following allegations of fraud. Upon resignation, the he was required to undertake clearance and his terminal dues were paid through expenditure 1(a)(d) final payment benefits – declaration form.
14. Save to assert he was forced tender his resignation, the respondent did not claim under constructive dismissal. He has not pleaded such matter.
15. The respondent testified in support of his case and gave emphasis that his employment was terminated after he was taken through the disciplinary hearing in November 2017;
- ... After the disciplinary hearing, I was given two options; I be terminated without getting any dues and second I write a resignation and get paid my dues. I wrote the resignation letter but I haven't received my dues. I was to be paid but I have not been paid. I have not been charged with fraud. ...
16. An employee, aware of his rights and is given two options to resign and get paid terminal dues or opt to go through the disciplinary process and then lose his terminal benefits has indeed a choice to make. On the one hand, the appellant had commenced disciplinary process which the respondent admits was ongoing as of November 2017. The matter related to alleged fraud.
17. Where the respondent knew he was innocent, he ought to have allowed the due process at the shop floor to take its course and to be cleared. However, in his own pleadings, he admits that on December 8, 2017 he was forced by the respondent to tender in his resignation letter after the claimant undertook a faulty transaction.



18. Undertaking a faulty transaction is not gone into. Save, these pleadings arising from the respondent as the employee have a bearing on the ongoing disciplinary proceedings against him.
19. By taking the option to resign, the respondent cannot justify turning around to assert a case of innocence on the face of his admission that he was undertaken a faulty transaction.
20. In the Amended Memorandum of claim filed on 27 September 2020 the respondent defined the appellant as microfinance business and he was employed as a Business Development Officer. The court takes judicial notice that banking and micro finance institutions in their nature are very sensitive as they handle client's money and a simple digital fault in a transaction could mean serious business implications.
21. The question of loss of trust and confidence once raised in the finance sector is a key trigger as held in *Family Bank Limited v Panda Co-operative Savings and Credit Society* [2022] eKLR that;

... the Appellant in evidence did not give any justification whatsoever for the transfer of the funds from the Respondent's account to a third party's. It only stated that the account from which the money was moved was not an interest earning account for which reason no interests or damages ought to have been awarded. This rejoinder in my view demonstrated impassiveness for the duty the Bank owed to its client. It also demonstrated insensitivity in whatever loss the client may have incurred by not accessing funds it would have otherwise put into better use. Such action amounted to lack of trust and faith in the way the bank operated which strictly speaking amounted to a breach of fiduciary duty.
22. This position is reiterated in the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* (2015) eKLR that finance institutions are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment and therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customer's points to fraud, such a staff risks termination of his or her employment.
23. Faced with disciplinary proceedings following a faulty transaction, taking the option to resign cannot sanitise the respondent to seek in constructive dismissal. To create such expectation is to fail to appreciate the essence of such a concept that only accrue where the employer has placed the employee under intolerable working conditions forcing the employee to tender his resignation notice due to the conduct of the employer. In this case, the disciplinary hearing ongoing at the time the respondent opted to resign had not concluded with a sanction. Had the respondent waited for a conclusion, he was still secured in law to assert his rights pursuant to section 35(40) of the *Employment Act*, 2007 that;
 - (4) Nothing in this section affects the right—
 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

the court finds the respondent tendered his resignation on 8 December 2017. Such was his right to undertake.
24. The respondent gave a one month notice hence taking effect on 7 January 2019.
25. The claim for notice pay should not arise.



26. Having resigned, the respondent was owed his terminal dues.
27. Part of the terminal dues tabulated by the appellant for the respondent were;

- a. Final salary Kshs. 9,598.95;
 - b. Final travel allowance Ksh.1,05.94;
 - c. Pay in lieu of leave Kshs. 18,527.92;
 - d. Final entertainment allowance 00
 - e. Gratuity accrued Kshs. 40,500
- Total Kshs. 136,979.62
- Less deductions PAYE Kshs. 40,224.83;
- Client money Kshs. 96,754.60
- Outstanding loan Kshs. 47,745.40
- Net payable Ksh.00
- Total negative Kshs. 47,744.

Resulting balance payable is in the negative.

The respondent owes the appellant.

28. On the awards by the trial court, notice pay is not due taking into account, the respondent resigned from his employment and offered to serve under the notice period.
29. Pending leave days and gratuity are cashed and allocated in the final dues tabulations.
30. Issuance of a Certificate of Service is a statutory requirement under section 51 of the [Employment Act, 2007](#) and such should issue at the end of employment.
31. Accordingly, the appeal herein is found with merit and is allowed. The Judgment in Malindi CM ELRC No. 54 of 2019 is hereby set aside in its entirety. Costs of the appeal awarded to the appellant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

